



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 20, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record submitted by Members of the Committee following the Attorney General's testimony on May 19, 2005. These responses are to questions 20-23 and 45, are unrelated to the USA PATRIOT Act, and supplement the responses submitted to the Committee on July 12, 2005.

We hope that you will find this information useful. Should you require anything further, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: ✓ The Honorable John Conyers, Jr.
Ranking Minority Member

20) Does any department or agency of the U.S. government have the legal authority to transport U.S. citizens or non-citizens to foreign governments that practice torture or other inhumane treatment? Please provide an unclassified and classified copy of any document(s) pertaining to such authority.

ANSWER: While not related to the USA PATRIOT Act, the United States Government has the legal authority to transfer individuals in its custody to foreign countries in various contexts and for various purposes. Consistent with the Convention Against Torture, it is the policy of the United States not to transfer involuntarily any individual to a country in which the United States determines that it is more likely than not that the individual would be tortured. The United States makes such determinations on a case-by-case basis, taking into account factors such as the particular circumstances of the transfer, the country, and the individual concerned. It is the policy of the United States to seek assurances, when appropriate under the circumstances, including assurances that the government accepting transfer will not subject the individual to torture. The essential question in evaluating foreign government assurances is whether the competent United States Government officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. Transfers in which the Department of Justice plays an operational role occur primarily in two contexts: in immigration-removal, where the Department adjudicates cases and, as appropriate and in coordination with the Department of Homeland Security, facilitates removal; and in extradition, where the Department reviews extradition requests and, as appropriate and in coordination with the Department of State, pursues extradition. *See* 8 U.S.C. ch. 12, subch. II, pt. IV, & subch. V (immigration removal); 18 U.S.C. pt. II, ch. 209 (extradition); *see also* 8 U.S.C. § 1231 note; 8 C.F.R. §§ 208.16-.18 (providing for withholding and deferral of removal under the Convention Against Torture); *id.* §§ 1208.16-.18 (same); 22 C.F.R. §§ 95.1-.4 (Department of State regulations implementing Convention Against Torture in extradition cases). In addition to these cited statutes and regulations, several publicly available documents, such as the *Immigration Judge Benchbook*, Operating Policies and Procedures Memorandum No. 99-5: *Implementation of Article 3 of the UN Convention Against Torture* (May 14, 1999) (issued by the Office of the Chief Immigration Judge, Executive Office for Immigration Review), and titles 9-15 of the *United States Attorneys' Manual*, appear responsive to your document request, as it pertains to the Department. Additional documents relating to the Department's policies and practices may be available. Requests for documents pertaining to the authority pursuant to which other departments or agencies conduct transfers would be appropriately addressed through the oversight process for those departments or agencies. To the extent that your request is for documents reflecting legal advice (if any) provided by the Department relating to these topics, there are substantial confidentiality interests associated with any such documents, which would consist of advisory and deliberative materials and internal legal analyses. Their disclosure outside the Executive Branch would harm the deliberative processes of the Executive Branch and disrupt attorney-client relationships.

- 21) Does any department or agency of the U.S. government have the legal authority to transport foreign nationals to foreign governments for the purpose of obtaining information? Please provide an unclassified and classified copy of any document(s) pertaining to such authority.**

ANSWER: Please see answer to question 20, above.

- 22) Has the Justice Department prosecuted American personnel who transported U.S. citizens or non-citizens to foreign governments that practice torture or other inhumane treatment? If not, why?**

ANSWER: While not related to the USA PATRIOT Act, we are not aware of any case where the Department has prosecuted a U.S. national for such an act. If you have evidence of activity that may constitute a federal crime, we would encourage you to report it to the Department for appropriate investigation. Any such investigation will carefully evaluate the facts and determine if there is probable cause to believe that a federal crime has been committed.

- 23) (a) What categories of persons currently in U.S. military custody are excluded from the protections of the U.N. Convention Against Torture?**

ANSWER: While not related to the USA PATRIOT Act, the Convention Against Torture provides that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent such acts of torture in any territory under its jurisdiction” and that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Consistent with this provision, the President has recently and repeatedly reaffirmed the longstanding policy that the United States will neither commit nor condone torture under any circumstances. It also provides that “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law.” The United States has fully implemented its obligations relating to this provision. The federal torture statute prohibits torture committed outside the United States. 18 U.S.C. §§ 2340-2340A. The Constitution and numerous state and federal criminal laws prohibit conduct that amounts to torture within the United States. In addition, Article 3 of the Convention Against Torture provides that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The United States undertook this obligation subject to a Senate understanding that provides: “the United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’” Finally, Article 16 of the Convention Against Torture provides that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” The United States undertook this obligation subject to a Senate reservation that provides: “the United States considers itself bound by the obligation under

Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." The applicability of these various provisions does not turn on a detainee's membership in or affiliation with al Qaeda, the Taliban, or other such organizations.

(b) What categories of persons currently in U.S. military custody are excluded from the protections of the Geneva Conventions?

ANSWER: The President has made clear that our Nation has been and will continue to be a strong supporter of the Geneva Conventions and the principles embodied therein. The Geneva Conventions, however, by their terms do not apply to all armed conflicts or provide a protected status to all persons regardless of circumstances and conditions. The Conventions do not apply to our conflict with al Qaeda because, among other reasons, al Qaeda is not a party to the Conventions. With respect to our conflict with the Taliban, the President determined that the Geneva Conventions do apply, but that Taliban detainees do not qualify for "prisoner of war" status because they do not satisfy the requirements set forth in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. For example, they do not conduct their operations in accordance with the laws and customs of war, they are not commanded by a person responsible for his subordinates, and they do not have a fixed distinctive sign recognizable at a distance. The Geneva Convention Relative to the Treatment of Prisoners of War also applies to the conflict in Iraq and protects those who qualify for "prisoner of war" status under Article 4 of that Convention. In addition, during the occupation of Iraq, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War protected those in Iraq who qualified for "protected person" status under Article 4 of that Convention. Regardless of the precise scope of the Geneva Conventions, the President has directed that, as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

- 45) **Attorney General Gonzales, in your Senate testimony you said that the Administration's policy is that "we don't engage in torture, we don't condone torture, and we're not going to render people to countries where we think it's more likely than not that they're going to be tortured." That standard seems to be lower than the International Convention Against Torture, which prohibits the rendition of an individual "where there are substantial grounds for believing that he would be in danger of being subjected to torture."**

Is the Administration's policy not to render prisoners only if it is "more likely than not" they will be tortured? And if so, what is the standard for determining whether it's more likely than not that a person will be tortured? For example, what if it is determined that there is a 49% chance that they will be tortured? Or is the Administration adhering to the "substantial grounds" standard of the Geneva Convention?

ANSWER: While not related to the USA PATRIOT Act, the United States undertook its obligations under the Convention Against Torture subject to an understanding required by the Senate that provides: “the United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’” This understanding, which was deposited with the United States instrument of ratification, defines the scope of United States obligations under Article 3 of the Convention Against Torture as a matter of both domestic and international law. Consistent with the Convention Against Torture, it is the policy of the United States not to involuntarily transfer any individual to a country in which the United States determines that it is more likely than not that the individual would be tortured. The United States makes such determinations on a case-by-case basis, taking into account factors such as the particular circumstances of the transfer, the country, and the individual concerned. In the immigration-removal and extradition contexts (see our response to Question 20), federal regulations further elaborate the relevant procedures.